
SUBSTITUTE SENATE BILL 5018

State of Washington

60th Legislature

2007 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators Jacobsen, Kline and Roach)

READ FIRST TIME 02/28/07.

1 AN ACT Relating to guardianship roles; and amending RCW 11.88.010
2 and 11.88.090.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 11.88.010 and 2005 c 236 s 3 are each amended to read
5 as follows:

6 (1) The superior court of each county shall have power to appoint
7 guardians for the persons and/or estates of incapacitated persons, and
8 guardians for the estates of nonresidents of the state who have
9 property in the county needing care and attention.

10 (a) For purposes of this chapter, a person may be deemed
11 incapacitated as to person when the superior court determines the
12 individual has a significant risk of personal harm based upon a
13 demonstrated inability to adequately provide for nutrition, health,
14 housing, or physical safety.

15 (b) For purposes of this chapter, a person may be deemed
16 incapacitated as to the person's estate when the superior court
17 determines the individual is at significant risk of financial harm
18 based upon a demonstrated inability to adequately manage property or
19 financial affairs.

1 (c) A determination of incapacity is a legal not a medical
2 decision, based upon a demonstration of management insufficiencies over
3 time in the area of person or estate. Age, eccentricity, poverty, or
4 medical diagnosis alone shall not be sufficient to justify a finding of
5 incapacity.

6 (d) A person may also be determined incapacitated if he or she is
7 under the age of majority as defined in RCW 26.28.010.

8 (e) For purposes of giving informed consent for health care
9 pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any
10 person who is (i) incompetent by reason of mental illness,
11 developmental disability, senility, habitual drunkenness, excessive use
12 of drugs, or other mental incapacity, of either managing his or her
13 property or caring for himself or herself, or both, or (ii)
14 incapacitated as defined in (a), (b), or (d) of this subsection.

15 (f) For purposes of the terms "incompetent," "disabled," or "not
16 legally competent," as those terms are used in the Revised Code of
17 Washington to apply to persons incapacitated under this chapter, those
18 terms shall be interpreted to mean "incapacitated" persons for purposes
19 of this chapter.

20 (2) The superior court for each county shall have power to appoint
21 limited guardians for the persons and estates, or either thereof, of
22 incapacitated persons, who by reason of their incapacity have need for
23 protection and assistance, but who are capable of managing some of
24 their personal and financial affairs. After considering all evidence
25 presented as a result of such investigation, the court shall impose, by
26 order, only such specific limitations and restrictions on an
27 incapacitated person to be placed under a limited guardianship as the
28 court finds necessary for such person's protection and assistance. A
29 person shall not be presumed to be incapacitated nor shall a person
30 lose any legal rights or suffer any legal disabilities as the result of
31 being placed under a limited guardianship, except as to those rights
32 and disabilities specifically set forth in the court order establishing
33 such a limited guardianship. In addition, the court order shall state
34 the period of time for which it shall be applicable.

35 (3) Venue for petitions for guardianship or limited guardianship
36 shall lie in the county wherein the alleged incapacitated person is
37 domiciled, or if such person resides in a facility supported in whole
38 or in part by local, state, or federal funding sources, in either the

1 county where the facility is located, the county of domicile prior to
2 residence in the supported facility, or the county where a parent or
3 spouse of the alleged incapacitated person is domiciled.

4 If the alleged incapacitated person's residency has changed within
5 one year of the filing of the petition, any interested person may move
6 for a change of venue for any proceedings seeking the appointment of a
7 guardian or a limited guardian under this chapter to the county of the
8 alleged incapacitated person's last place of residence of one year or
9 more. The motion shall be granted when it appears to the court that
10 such venue would be in the best interests of the alleged incapacitated
11 person and would promote more complete consideration of all relevant
12 matters.

13 (4) Under RCW 11.94.010, a principal may nominate, by a durable
14 power of attorney, the guardian or limited guardian of his or her
15 estate or person for consideration by the court if guardianship
16 proceedings for the principal's person or estate are thereafter
17 commenced. The court shall make its appointment in accordance with the
18 principal's most recent nomination in a durable power of attorney
19 except for good cause or disqualification.

20 (5) Imposition of a guardianship for an incapacitated person shall
21 not result in the loss of the right to vote unless the court determines
22 that the person is incompetent for purposes of rationally exercising
23 the franchise in that the individual lacks the capacity to understand
24 the nature and effect of voting such that she or he cannot make an
25 individual choice. The court order establishing guardianship shall
26 specify whether or not the individual retains voting rights. When a
27 court determines that the person is incompetent for the purpose of
28 rationally exercising the right to vote, the court shall notify the
29 appropriate county auditor.

30 (6) A professional guardian shall not serve as both a guardian or
31 limited guardian and an attorney or guardian ad litem for the same
32 incapacitated person, except that a professional guardian may serve as
33 both a guardian or limited guardian and an attorney or guardian ad
34 litem for the same incapacitated person only in extraordinary
35 circumstances and only for as long as the extraordinary circumstances
36 exist, including but not limited to situations in which there is no
37 person who is qualified and willing to serve as guardian or limited

1 guardian. In such circumstances, the guardian ad litem must show that
2 due diligence has been used to locate a suitable guardian or limited
3 guardian.

4 **Sec. 2.** RCW 11.88.090 and 2000 c 124 s 1 are each amended to read
5 as follows:

6 (1) Nothing contained in RCW 11.88.080 through 11.88.120, 11.92.010
7 through 11.92.040, 11.92.060 through 11.92.120, 11.92.170, and
8 11.92.180 shall affect or impair the power of any court to appoint a
9 guardian ad litem to defend the interests of any incapacitated person
10 interested in any suit or matter pending therein, or to commence and
11 prosecute any suit in his or her behalf.

12 (2) Prior to the appointment of a guardian or a limited guardian,
13 whenever it appears that the incapacitated person or incapacitated
14 person's estate could benefit from mediation and such mediation would
15 likely result in overall reduced costs to the estate, upon the motion
16 of the alleged incapacitated person or the guardian ad litem, or
17 subsequent to such appointment, whenever it appears that the
18 incapacitated person or incapacitated person's estate could benefit
19 from mediation and such mediation would likely result in overall
20 reduced costs to the estate, upon the motion of any interested person,
21 the court may:

22 (a) Require any party or other person subject to the jurisdiction
23 of the court to participate in mediation;

24 (b) Establish the terms of the mediation; and

25 (c) Allocate the cost of the mediation pursuant to RCW
26 (~~11.96.140~~) 11.96A.150.

27 (3) Upon receipt of a petition for appointment of guardian or
28 limited guardian, except as provided herein, the court shall appoint a
29 guardian ad litem to represent the best interests of the alleged
30 incapacitated person, who shall be a person found or known by the court
31 to:

32 (a) Be free of influence from anyone interested in the result of
33 the proceeding; (~~and~~)

34 (b) Have the requisite knowledge, training, or expertise to perform
35 the duties required by this section; and

36 (c) Not be a professional guardian seeking appointment as a

1 guardian or limited guardian unless the person has complied with the
2 ethical advisory opinions issued by the certified professional guardian
3 board with respect to petitions for self-appointment.

4 The guardian ad litem shall within five days of receipt of notice
5 of appointment file with the court and serve, either personally or by
6 certified mail with return receipt, each party with a statement
7 including: His or her training relating to the duties as a guardian ad
8 litem; his or her criminal history as defined in RCW 9.94A.030 for the
9 period covering ten years prior to the appointment; his or her hourly
10 rate, if compensated; whether the guardian ad litem has had any contact
11 with a party to the proceeding prior to his or her appointment; and
12 whether he or she has an apparent conflict of interest. Within three
13 days of the later of the actual service or filing of the guardian ad
14 litem's statement, any party may set a hearing and file and serve a
15 motion for an order to show cause why the guardian ad litem should not
16 be removed for one of the following three reasons: (i) Lack of
17 expertise necessary for the proceeding; (ii) an hourly rate higher than
18 what is reasonable for the particular proceeding; or (iii) a conflict
19 of interest. Notice of the hearing shall be provided to the guardian
20 ad litem and all parties. If, after a hearing, the court enters an
21 order replacing the guardian ad litem, findings shall be included,
22 expressly stating the reasons for the removal. If the guardian ad
23 litem is not removed, the court has the authority to assess to the
24 moving party, attorneys' fees and costs related to the motion. The
25 court shall assess attorneys' fees and costs for frivolous motions.

26 No guardian ad litem need be appointed when a parent is petitioning
27 for a guardian or a limited guardian to be appointed for his or her
28 minor child and the minority of the child, as defined by RCW 11.92.010,
29 is the sole basis of the petition. The order appointing the guardian
30 ad litem shall recite the duties set forth in subsection (5) of this
31 section. The appointment of a guardian ad litem shall have no effect
32 on the legal competency of the alleged incapacitated person and shall
33 not overcome the presumption of competency or full legal and civil
34 rights of the alleged incapacitated person.

35 (4)(a) The superior court of each county shall develop and maintain
36 a registry of persons who are willing and qualified to serve as
37 guardians ad litem in guardianship matters. The court shall choose as
38 guardian ad litem a person whose name appears on the registry in a

1 system of consistent rotation, except in extraordinary circumstances
2 such as the need for particular expertise. The court shall develop
3 procedures for periodic review of the persons on the registry and for
4 probation, suspension, or removal of persons on the registry for
5 failure to perform properly their duties as guardian ad litem. In the
6 event the court does not select the person next on the list, it shall
7 include in the order of appointment a written reason for its decision.

8 (b) To be eligible for the registry a person shall:

9 (i) Present a written statement outlining his or her background and
10 qualifications. The background statement shall include, but is not
11 limited to, the following information:

12 (A) Level of formal education;

13 (B) Training related to the guardian ad litem's duties;

14 (C) Number of years' experience as a guardian ad litem;

15 (D) Number of appointments as a guardian ad litem and the county or
16 counties of appointment;

17 (E) Criminal history, as defined in RCW 9.94A.030; and

18 (F) Evidence of the person's knowledge, training, and experience in
19 each of the following: Needs of impaired elderly people, physical
20 disabilities, mental illness, developmental disabilities, and other
21 areas relevant to the needs of incapacitated persons, legal procedure,
22 and the requirements of chapters 11.88 and 11.92 RCW.

23 The written statement of qualifications shall include the names of
24 any counties in which the person was removed from a guardian ad litem
25 registry pursuant to a grievance action, and the name of the court and
26 the cause number of any case in which the court has removed the person
27 for cause; and

28 (ii) Complete the training as described in (e) of this subsection.
29 The training is not applicable to guardians ad litem appointed pursuant
30 to special proceeding Rule 98.16W.

31 (c) Superior court shall remove any person from the guardian ad
32 litem registry who misrepresents his or her qualifications pursuant to
33 a grievance procedure established by the court.

34 (d) The background and qualification information shall be updated
35 annually.

36 (e) The department of social and health services shall convene an
37 advisory group to develop a model guardian ad litem training program
38 and shall update the program biennially. The advisory group shall

1 consist of representatives from consumer, advocacy, and professional
2 groups knowledgeable in developmental disabilities, neurological
3 impairment, physical disabilities, mental illness, domestic violence,
4 aging, legal, court administration, the Washington state bar
5 association, and other interested parties.

6 (f) The superior court shall require utilization of the model
7 program developed by the advisory group as described in (e) of this
8 subsection, to assure that candidates applying for registration as a
9 qualified guardian ad litem shall have satisfactorily completed
10 training to attain these essential minimum qualifications to act as
11 guardian ad litem.

12 (5) The guardian ad litem appointed pursuant to this section shall
13 have the following duties:

14 (a) To meet and consult with the alleged incapacitated person as
15 soon as practicable following appointment and explain, in language
16 which such person can reasonably be expected to understand, the
17 substance of the petition, the nature of the resultant proceedings, the
18 person's right to contest the petition, the identification of the
19 proposed guardian or limited guardian, the right to a jury trial on the
20 issue of his or her alleged incapacity, the right to independent legal
21 counsel as provided by RCW 11.88.045, and the right to be present in
22 court at the hearing on the petition;

23 (b) To obtain a written report according to RCW 11.88.045; and such
24 other written or oral reports from other qualified professionals as are
25 necessary to permit the guardian ad litem to complete the report
26 required by this section;

27 (c) To meet with the person whose appointment is sought as guardian
28 or limited guardian and ascertain:

29 (i) The proposed guardian's knowledge of the duties, requirements,
30 and limitations of a guardian; and

31 (ii) The steps the proposed guardian intends to take or has taken
32 to identify and meet the needs of the alleged incapacitated person;

33 (d) To consult as necessary to complete the investigation and
34 report required by this section with those known relatives, friends, or
35 other persons the guardian ad litem determines have had a significant,
36 continuing interest in the welfare of the alleged incapacitated person;

37 (e) To investigate alternate arrangements made, or which might be
38 created, by or on behalf of the alleged incapacitated person, such as

1 revocable or irrevocable trusts, durable powers of attorney, or blocked
2 accounts; whether good cause exists for any such arrangements to be
3 discontinued; and why such arrangements should not be continued or
4 created in lieu of a guardianship;

5 (f) To provide the court with a written report which shall include
6 the following:

7 (i) A description of the nature, cause, and degree of incapacity,
8 and the basis upon which this judgment was made;

9 (ii) A description of the needs of the incapacitated person for
10 care and treatment, the probable residential requirements of the
11 alleged incapacitated person and the basis upon which these findings
12 were made;

13 (iii) An evaluation of the appropriateness of the guardian or
14 limited guardian whose appointment is sought and a description of the
15 steps the proposed guardian has taken or intends to take to identify
16 and meet current and emerging needs of the incapacitated person;

17 (iv) A description of any alternative arrangements previously made
18 by the alleged incapacitated person or which could be made, and whether
19 and to what extent such alternatives should be used in lieu of a
20 guardianship, and if the guardian ad litem is recommending
21 discontinuation of any such arrangements, specific findings as to why
22 such arrangements are contrary to the best interest of the alleged
23 incapacitated person;

24 (v) A description of the abilities of the alleged incapacitated
25 person and a recommendation as to whether a guardian or limited
26 guardian should be appointed. If appointment of a limited guardian is
27 recommended, the guardian ad litem shall recommend the specific areas
28 of authority the limited guardian should have and the limitations and
29 disabilities to be placed on the incapacitated person;

30 (vi) An evaluation of the person's mental ability to rationally
31 exercise the right to vote and the basis upon which the evaluation is
32 made;

33 (vii) Any expression of approval or disapproval made by the alleged
34 incapacitated person concerning the proposed guardian or limited
35 guardian or guardianship or limited guardianship;

36 (viii) Identification of persons with significant interest in the
37 welfare of the alleged incapacitated person who should be advised of

1 their right to request special notice of proceedings pursuant to RCW
2 11.92.150; and

3 (ix) Unless independent counsel has appeared for the alleged
4 incapacitated person, an explanation of how the alleged incapacitated
5 person responded to the advice of the right to jury trial, to
6 independent counsel and to be present at the hearing on the petition.

7 Within forty-five days after notice of commencement of the
8 guardianship proceeding has been served upon the guardian ad litem, and
9 at least fifteen days before the hearing on the petition, unless an
10 extension or reduction of time has been granted by the court for good
11 cause, the guardian ad litem shall file its report and send a copy to
12 the alleged incapacitated person and his or her counsel, spouse, all
13 children not residing with a notified person, those persons described
14 in (f)(viii) of this subsection, and persons who have filed a request
15 for special notice pursuant to RCW 11.92.150. If the guardian ad litem
16 needs additional time to finalize his or her report, then the guardian
17 ad litem shall petition the court for a postponement of the hearing or,
18 with the consent of all other parties, an extension or reduction of
19 time for filing the report. If the hearing does not occur within sixty
20 days of filing the petition, then upon the two-month anniversary of
21 filing the petition and on or before the same day of each following
22 month until the hearing, the guardian ad litem shall file interim
23 reports summarizing his or her activities on the proceeding during that
24 time period as well as fees and costs incurred;

25 (g) To advise the court of the need for appointment of counsel for
26 the alleged incapacitated person within five court days after the
27 meeting described in (a) of this subsection unless (i) counsel has
28 appeared, (ii) the alleged incapacitated person affirmatively
29 communicated a wish not to be represented by counsel after being
30 advised of the right to representation and of the conditions under
31 which court-provided counsel may be available, or (iii) the alleged
32 incapacitated person was unable to communicate at all on the subject,
33 and the guardian ad litem is satisfied that the alleged incapacitated
34 person does not affirmatively desire to be represented by counsel.

35 (6) If the petition is brought by an interested person or entity
36 requesting the appointment of some other qualified person or entity and
37 a prospective guardian or limited guardian cannot be found, the court
38 shall order the guardian ad litem to investigate the availability of a

1 possible guardian or limited guardian and to include the findings in a
2 report to the court pursuant to subsection (5)(f) of this section. In
3 no case shall the court order the guardian ad litem to also serve as a
4 professional guardian for the same client.

5 (7) The parties to the proceeding may file responses to the
6 guardian ad litem report with the court and deliver such responses to
7 the other parties and the guardian ad litem at any time up to the
8 second day prior to the hearing. If a guardian ad litem fails to file
9 his or her report in a timely manner, the hearing shall be continued to
10 give the court and the parties at least fifteen days before the hearing
11 to review the report. At any time during the proceeding upon motion of
12 any party or on the court's own motion, the court may remove the
13 guardian ad litem for failure to perform his or her duties as specified
14 in this chapter, provided that the guardian ad litem shall have five
15 days' notice of any motion to remove before the court enters such
16 order. In addition, the court in its discretion may reduce a guardian
17 ad litem's fee for failure to carry out his or her duties.

18 (8) The court appointed guardian ad litem shall have the authority,
19 in the event that the alleged incapacitated person is in need of
20 emergency life-saving medical services, and is unable to consent to
21 such medical services due to incapacity pending the hearing on the
22 petition to give consent for such emergency life-saving medical
23 services on behalf of the alleged incapacitated person.

24 (9) The court-appointed guardian ad litem shall have the authority
25 to move for temporary relief under chapter 7.40 RCW to protect the
26 alleged incapacitated person from abuse, neglect, abandonment, or
27 exploitation, as those terms are defined in RCW 74.34.020, or to
28 address any other emergency needs of the alleged incapacitated person.
29 Any alternative arrangement executed before filing the petition for
30 guardianship shall remain effective unless the court grants the relief
31 requested under chapter 7.40 RCW, or unless, following notice and a
32 hearing at which all parties directly affected by the arrangement are
33 present, the court finds that the alternative arrangement should not
34 remain effective.

35 (10) The guardian ad litem shall receive a fee determined by the
36 court.

37 (a) If a full or limited guardianship is established, or no
38 guardianship is established but a less restrictive alternative

1 arrangement is approved by the court and the alleged incapacitated
2 person is determined by the court to be incapacitated, the fee shall be
3 charged to the alleged incapacitated person unless the court finds that
4 such payment would result in substantial hardship upon such person, in
5 which case the county shall be responsible for such costs(~~(+PROVIDED,~~
6 ~~That))~~).

7 (b) If there is no finding of incapacity by the court, the court
8 may charge such fee to the petitioner, the alleged incapacitated
9 person, or any person who has appeared in the action; or may allocate
10 the fee, as it deems just. If the petition is found to be frivolous or
11 not brought in good faith, the guardian ad litem fee shall be charged
12 to the petitioner. The court shall not be required to provide for the
13 payment of a fee to any salaried employee of a public agency.

14 (11) Upon the presentation of the guardian ad litem report and the
15 entry of an order either dismissing the petition for appointment of
16 guardian or limited guardian or appointing a guardian or limited
17 guardian, the guardian ad litem shall be dismissed and shall have no
18 further duties or obligations unless otherwise ordered by the court.
19 If the court orders the guardian ad litem to perform further duties or
20 obligations, they shall not be performed at county expense.

21 (12) The guardian ad litem shall appear in person at all hearings
22 on the petition unless all parties provide a written waiver of the
23 requirement to appear.

24 (13) At any hearing the court may consider whether any person who
25 makes decisions regarding the alleged incapacitated person or estate
26 has breached a statutory or fiduciary duty.

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